No. 83-5517

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERBERT CHARLES BLATCHFORD, JR.,

Appellant,

vs.

HARRY WINANS, Warden of the
New Mexico State Penitentiary,

Appellee.

On Appeal From The Supreme Court
Of The State Of New Mexico

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Supreme Court of New Mexico correctly applied 18 U.S.C. § 1151(a) and (b), to find that the New Mexico State District Court had jurisdiction to try appellant for crimes allegedly committed (a) within an extension to the Navajo Reservation added by Executive Order 709 (November 9, 1907), as amended by Executive Order 744 (January 28, 1908), and (b) in a dependent Indian community as defined by 18 U.S.C. § 1151 (b), and decisions of this Court?

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OPINIONS BELOW

The opinion of the New Mexico District Court for San Miguel County is not reported, but is reproduced in Appendix B, pp. 1b-14b. The opinion of the New Mexico Supreme Court has not been officially reported, nor has it yet appeared in the regional reporter, but it is set out in 22 N.M. St. Bar Bull. 815, and is reproduced in Appendix A, pp. 1a-6a.

GROUNDS FOR JURISDICTION

1. The Appellate Jurisdiction Of This Court Under 28 U.S.C. § 1257(2) Is Properly Invoked.

The judgment of the Supreme Court of New Mexico, holding that 18 U.S.C. §§ 1151 and 1153 are not applicable to Appellant, was entered on July 21, 1983. Appeal was noticed on October 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). The New Mexico Supreme Court first held that the lower state court was without jurisdiction to entertain the habeas corpus petition of Mr. Blatchford, because he had not previously availed himself of the post-conviction remedies under Rule 57, N.M. Crim. P. Then, under its original jurisdiction to hear habeas corpus petitions, granted by Article VI, Section 3 of the

New Mexico Constitution of 1911, the New Mexico Supreme Court determined the merits of Mr. Blatchford's case against him. Though Mr. Blatchford's claims arose exclusively out of federal law, the court held that Yah-ta-Hey was not within Indian country, nor was it a dependent Indian community, as defined in 18 U.S.C. § 1151(a) and (b), and, therefore, there was no exclusive federal jurisdiction under 18 U.S.C. § 1153. Notwithstanding the Supremacy Clause of the Constitution, Art. VI, clause 2, the New Mexico Supreme Court construed 18 U.S.C. §§ 1151(a) and (b), and 1153, which ordains exclusive federal jurisdiction over certain crimes committed within Indian country, as not to be valid in the community of Yah-ta-Hey.

2. The Decision Of The New Mexico Supreme Court Does Not Rest Upon Adequate And Independent State Grounds.

In its July 21st decision, the New Mexico Supreme Court issued two holdings: first, that the State District Court, not the New Mexico Supreme Court, lacked jurisdiction to hear Mr. Blatchford's case, and second, that the federal courts did not have exclusive jurisdiction over Mr. Blatchford's alleged crimes, since they did not occur in "Indian country", as defined in 18 U.S.C. § 1151(a) and (b). Thus, even if Mr. Blatchford had used the correct procedural vehicle, a Rule 57 motion, the New Mexico Supreme Court's pronouncement on the merits would have resulted in that court's appellate rejection of his arguments. The New Mexico Supreme Court, as this Court, cannot issue advisory opinions. Advance Loan Co. v. Kovach, 79 N.M. 509, 511, 445 P.2d 386, 388 (1968); Bell Telephone Laboratories, Inc. v. Bureau of Revenue, 78 N.M. 78, 84, 428 P.2d 617, 623, appeal dismissed, 388 U.S. 457 (1967). Moreover, an appellate court can validly rest its decision on two bases, and such a dual ground does not make either holding obiter or advisory. E.g., United States v. Title Insurance & Trust Co., 265 U.S. 472, 486 (1924), construing Barker v. Harvey, 181 U.S. 481 (1901). The New Mexico Supreme Court quite properly availed itself "of the power to entertain the federal claim here presented," Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969) (emphasis in original), since it unquestionably did possess original jurisdiction to pass on the merits of the habeas corpus petition of Mr. Blatchford. See, In Re Santillanes, 47 N.M. 140, 145, 138 P.2d 503, 506 (1943); In Re Forest, 45 N.M. 204, 208, 113 P.2d

582, 584 (1941). Indeed, the New Mexico Supreme Court's "willingness to reach the merits of [Mr. Blatchford's] federal claims provides convincing proof that the judgment does not rest on adequate state grounds." Wardius v. Oregon, 412 U.S. 470, 477 n. 10 (1973). This Court has recently enunciated the test determining the adequacy and independence of a state decisional ground. In Michigan v. Long, 77 L.Ed.2d 1201 (1983), the touchstone was "when . . . a state court decision fairly appears to rest primarily upon federal law," it will be inferred "that the state court decides the case the way it did because it believed that federal law required it to do so." 77 L.Ed.2d at 1214. The opinion of the Supreme Court of New Mexico relies exclusively upon federal jurisprudential interpretations of 18 U.S.C. § 1151. Had the court decided that it did not possess jurisdiction because of the failure to comply with Rule 57, it would have perfunctorily dismissed the appeal, and would not have gone on to the merits. In that section of its opinion devoted to the merits, the court plainly states, as required by Michigan v. Long, supra, that the federal decisions are not "being used for the purpose of guidance" but "themselves compel the result that the court has reached." Id. See also, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977) and Delaware v. Prouse, 440 U.S. 648, 653 (1979), cited with approval in Michigan v. Long, supra, 77 L.Ed.2d at 1215, n. 8.

The decision of the New Mexico Supreme Court, therefore, does not rest upon independent and adequate state grounds, and is thus susceptible of review under this Court's appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
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> • • •

Title 28, United States Code, Section 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States

Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (June 25, 1948, ch. 645, 62 Stat. 757; May 24, 1949, ch. 139 § 25, 63 Stat. 94.)

United States Code - 1976 Edition, Supplement V, Volume 2, p. 985 (1982).

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Title 18, United States Code, Section 1153:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

(June 25, 1948, ch. 645, 62 Stat. 758; May 24, 1949, ch. 139, § 26, 63 Stat. 94; Nov. 2, 1966, Pub. L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub. L. 90-284, title V, § 501, 82 Stat. 80; May 29, 1976, Pub. L. 94-297, § 2, 90 Stat. 585.)

United States Code - 1976 Edition, Volume 4, p. 1171 (1977).

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Section 25 of the Act of May 29, 1908, ch. 216, 35 Stat. 457:

SEC. 25. That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive orders of November ninth, nineteen hundred and seven, and January twenty-eighth, nineteen hundred and eight, have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

STATEMENT OF THE CASE

Appellant Herbert Charles Blatchford, Jr. was convicted of the crimes of accessory to the criminal sexual penetration of a minor and accessory to kidnaping by the New Mexico State District Court for McKinley County on July 29, 1978. State v. Blatchford, Crim. No. CR-78-4, McKinley Co. N.M. Dist. Ct. The alleged crimes took place on Section 7 of Township 16 North, Range 18 West, New Mexico Principal Meridian, in an unincorporated community named Yah-ta-Hey. Yah-ta-Hey is approximately six and a half miles north of Gallup, New Mexico, and is located at the intersection of U.S. Highway 666 and New Mexico State Route 264, and is about two miles south of the original boundary of the Navajo reservation, as set up by the Second Treaty between the Navajo Nation and the United States. 15 Stat. 667 (1868). See, Appendix F.

Mr. Blatchford is an enrolled member of the Navajo Tribe, and his alleged victim is also an enrolled member of the Navajo Tribe.

Mr. Blatchford's conviction was affirmed by the Supreme Court of New Mexico in an unreported decision. State v. Blatchford, No. 12187 (N.M. March 1, 1979).

On January 25, 1982, Mr. Blatchford filed an in forma pauperis petition with the New Mexico District Court for San Miguel County, alleging that the State District Court lacked jurisdiction to try him for the crimes for which he was convicted, because they occurred within "Indian country", as defined in 18 U.S.C. § 1151(a) and (b). Blatchford v. Gonzales, No. 82-36-CV (N.M. Dist. Ct. San Miguel Co.). Certain crimes committed by an Indian in Indian country are within the exclusive jurisdiction of federal courts, pursuant to 18 U.S.C. § 1153. The State of New Mexico moved to dismiss for failure to exhaust remedies under Rule 57, N.M. Crim. P., and for attempting to use habeas corpus as a subetitute for appeal. The State subsequently moved for summary judgment, admitting that the crimes occurred between Indians, but denying that Yah-ta-Hey was within "Indian country" or a "dependent Indian community" as defined in 18 U.S.C. § 1151(a) and (b). The United States made an appearance as an amicus curiae, supporting New Mexico's contention that Yah-ta-Hey was not a dependent Indian community.

In answer to an enquiry by trial judge as to title status of Yah-ta-Hey, counsel for Mr. Blatchford pointed out that Executive Order 709 of November 9, 1907 which extended the boundaries of the Navajo Indian Reservation over Yah-ta-Hey, made Yah-ta-Hey "Indian country" within the meaing of 18 U.S.C. § 1151(a). Letter from Forest G. Buffington to Honorable Donaldo A. Martinez, April 5, 1982. After a hearing at which was heard the testimony of Mr. Willis Peterson, Delegate from the Rock Springs chapter to the Navajo Tribal Council, the District Judge rendered a decision on May 6, 1982, in favor of Mr. Martinez. See, Appendix B, pp. 1b-14b. The District Court held that Yah-ta-Hey was a part of Indian country, even though it was held in private fee ownership (1) because it is within the extension to the Navajo Indian Reservation made by Executive Order 709, and (2) Yah-ta-Hey is also a dependent Indian community because (a) it is a recognized area of use and occupancy by Navajo Indians, (b) the State of New Mexico had not extended its jurisdiction over the community, (c) it is within an area served by the Bureau of Indian Affairs and the Navajo Tribe for social welfare and law enforcement purposes, and (d) the population was overwhelmingly Navajo, approximately 75% of the total. Decision, Blatchford v. Gonzales, No. 82-36-CV (N.M. Dist. Ct. San Miguel Co., May 6, 1980); Appendix D, pp. 1b-14b. Judgment discharging Mr. Blatchford from custody was entered on May 25, 1982. Appendix B, p. 15b.

The State noticed an appeal to the New Mexico Supreme Court and obtained a stay of the judgment from the Supreme Court. Briefs were filed, and oral argument was had in December, 1982. The Supreme Court reversed and remanded the District Court on July 21, 1983. Blatchford v. Gonzales, No. 19361 (N.M. July 21, 1983); Appendix A. Appeal to this Court was noticed on October 12, 1983. Appendix C.

THE QUESTION IS SUBSTANTIAL

The New Mexico Supreme Court has sustained the validity of its criminal statutes, N.M. Stat. Ann. §§ 30-1-13, 30-9-11(A)(1), and 30-4-1, as applied to Mr. Blatchford, and held that 18 U.S.C. § 1153 is not applicable to the crimes allegedly committed in Yah-ta-Hey, New Mexico, because that community is not in "Indian country" as defined in 18 U.S.C. § 1151(a) and (b). The court erred

because of its faulty analysis of 18 U.S.C. § 1151(a) and (b), and because it misapplied the settled law concerning extinguishment of Indian title. The effect of such holding was to sustain the validity of the state criminal statutes in Indian country in contravention of the Supremacy Clause of Article VI of the Constitution. In light of the substantial governmental interest in 18 U.S.C. §§ 1151 and 1153, and in view of the federal government's trust responsibility towards Indians, reaffirmed last term in United States v. Mitchell, 77 L.Ed.2d 580, 596-97 (1983), this Court should note probable jurisdiction to review the New Mexico Supreme Court's decision.

1. This Court has consistently held that the extinguishment or termination of an Indian reservation is the prerogative of Congress alone, and has required those who assert that an extinguishment or termination took place should show "plain and unambiguous" statutory language to this effect. United States v. Santa Fe Pacific R.R., 314 U.S. 339, at 359 (1941); see also, Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). The New Mexico Supreme Court did not consider either Mattz or Seymour in coming to its determination that Indian title to the Yah-ta-Hey area was extinguished by the Second Navajo Treaty of 1868, 15 Stat. 668. Blatchford v. Gonzales, 22 N.M. St. Bar Bull. 815, 818-19; Appendix A, pp. 4a-5a.

A close reading of the 1868 treaty does not yield the conclusion that Indian title to areas outside of the original Navajo Reservation was, in fact, extinguished. But even if such an extinguishment took place, the subsequent addition of 1.9 million acres onto the Navajo reservation in New Mexico by Executive Orders 709 and 744, in 1907 and 1908 respectively (discussed below), shows that the area was, at the very least, "Indian country" after that time. The court did not even cite, much less consider, these executive orders; rather, it mistakenly cited Executive Order 2513 (January 15, 1917), 4 C. Kappler, ed., Indian Affairs: Laws and Treaties 1030 (1929), as the instrument which Mr. Blatchford contends annexed the Yah-ta-Hey area, inter alia, to the Navajo Reservation. Blatchford v. Gonzales, supra, 22 N.M. St. Bar Bull. at 817; Appendix A, p. 3a. No such contention was ever made either in the State District Court or in the Supreme Court. Rather, it was Executive Order 709 (November 9, 1907), 3 C. Kappler, ed., Indian Affairs:

Laws and Treaties 669 (1913), as amended by Executive Order 744 (January 28, 1908), 3 C. Kappler, ed., op. cit. 669-70, which withdrew more than two million acres of land in Arizona and New Mexico for an addition to the Navajo Reservation. See, Appendices D, E and F. (This point was emphasized to the court in Mr. Blatchford's brief and in oral argument.) By § 25 of the Act of May 29, 1908, ch. 216, 35 Stat. 457, the President was empowered to restore all surplus lands in the reservation addition once he was satisfied that "all the Indians in any part of the Reservation", as extended, were allotted. Presidents Roosevelt, Taft and Wilson subsequently issued executive orders restoring unallotted lands to the public domain. See, E.O. 1000 (December 30, 1908), 3 C. Kappler, ed., op. cit. 685; E.O. 1284 (January 16, 1911), E.O. 1359 (May 29, 1911); E.O. 1983 (February 17, 1912), 3 C. Kappler, ed., op. cit. 686.

2. Section 25 of the Act of 1908 does not facially terminate the E.O. 709 reservation; termination is required to be unequivocally stated within the statute. Mattz v. Arnett, supra, 412 U.S. at 505. The "surrounding circumstances and legislative history" of Section 25, which this Court found as necessary probative ingredients for reservation extinguishment in DeCoteau v. District Court, 420 U.S. 425, 445 (1975), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 84, 587 (1977), do not exist here. Moreover, the fact that state jurisdiction over the E.O. 709 area has gone unchallenged is not dispositive. United States v. John, 437 U.S. 634, 652 (1977). And this Court's teaching in Mattz was that opening of a reservation to white settlement is not termination or a cessation of federal jurisdiction. Further, in none of the executive orders subsequent to the 1908 statute is there found a recital that the 1907-1908 reservation addition has been abolished. Moreover, the fact that Congress ratified the Arizona portion of the E.O. 709 reservations by the Act of June 14, 1934, ch. 521, 48 Stat. 960, does not mean that the New Mexico portion of E.O. 709 was disestablished, since a series of departmental orders pursuant to § 3 of the Act of March 3, 1921, ch. 119, 41 Stat. 1239, and § 4 of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, continued the withdrawn status of lands within the E.O. 709 area pending passage of a New Mexico Navajo Reservation consolidation act by Congress. See, Secretarial Order of July 8, 1931, as amended by subsequent secretarial and departmental Orders:

4 Fed. Reg. 2717 (1939); 4 Fed. Reg. 3985 (1939); August 19, 1942; 8 Fed. Reg. 6857 (1943); 10 Fed. Reg. 1669 (1945); and Public Land Order 2198, 25 Fed. Reg. 8546 (1960).

3. This Court has never defined a "dependent Indian community", a phrase appearing in fragment (b) of 18 U.S.C. § 1151, but the term was first used in this Court's decision in United States v. Sandoval, 231 U.S. 28, 46 (1913), to refer to all species of Indian settlements. In United States v. McGowan, 302 U.S. 535 (1938), this Court focused on the fact that if a group of Indians are "under the supervision and guardianship of the United States," "it is immaterial" what rubric is used (in that case a "colony" rather than a "reservation") to designate such a settlement. 302 U.S. at 538-39. The New Mexico Supreme Court posited the "crucial consideration" to be "whether the community or land has been set apart for the use, occupancy and protection of dependent Indian peoples." 22 N.M. St. Bar Bull. at 817; Appendix A, 3a (emphasis in original). There is no question that Yah-ta-Hey and other areas were in fact set apart as a dependent Indian settlement by Executive Order 709. Even assuming, for the sake of argument, that the E.O. 709 reservation was in some manner abolished or terminated (such an assumption flies in face of Mattz, DeCoteau, Kneip and Seymour), it does not follow that Yah-ta-Hey thereby lost its "Indian community" identity, since such a status is a question of fact. Neither the State of New Mexico nor the courts below challenged the essential facts which describe Yah-ta-Hey: a settlement overwhelmingly Indian in nature, serviced by the B.I.A. and the Tribe for its social welfare, law enforcement and other governmental needs, and part of the E.O. 709 area. Moreover, since the New Mexico Supreme Court below fastened upon the "setting apart" factor, this Court ought to define just what that is. There is ample guidance from the lower federal courts. See, United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 103 S. Ct. 57 (1982) (public housing project within original boundaries of terminated Indian reservation held dependent Indian community [d.Lc.]); Wedell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (Wagner, S.D. with 16.3% Indian populations not d.Lc.); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971) (leading definitory case, holding Ramah Navajo community to be d.Lc.); C.M.G. v. State, 594 P.2d 798

(Okla. Crim. App.) cert. denied, 444 U.S. 992 (1979) (Chilocco Indian School d.Lc., even though open to non-Indian students); State v. Dana, 404 A.2d 551 (Me. 1979), cert. denied, 444 U.S. 1098 (1980) (Passamaquoddy Indian Township a d.Lc. even though legal title was not in U.S.).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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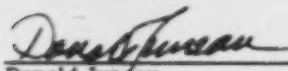
By 
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-vs-

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Appellee.

APPELLANT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Supreme Court of the United States and 28 U.S.C. §1915, Appellant Herbert Charles Blatchford, Jr., moves the Court for an Order permitting him to proceed in this Court in forma pauperis, in his appeal from the judgment of the Supreme Court of New Mexico entered in this cause on July 21, 1983.

In support of this Motion, the affidavit of Mr. Blatchford is attached.

The Jurisdictional Statement of Appellant is being filed with this Motion.

Respectfully submitted,

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Appellee.

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED ON APPEAL IN FORMA PAUPERIS

I, Herbert Charles Blatchford, Jr., being first duly sworn, depose and say that I am the Appellant, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are meritorious.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

H.C.B. Jr.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I have not been employed for more than ten years, and I do not recall the date of last employment, or the wages I received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

C.B.D.

6. I was granted leave to proceed in forma pauperis in the San Miguel County District Court when I filed the habeus corpus petition on May 25, 1982.

Pursuant to 28 U.S.C. §1768, I declare, under the penalty of perjury, that the above and foregoing is true and correct, to the best of my knowledge, information, and belief. Executed at the New Mexico State Penitentiary, Santa Fe County, New Mexico, October 12, 1983

Herbert Charles Blatchford Jr

Herbert Charles Blatchford, Jr.

Notices

SECTION B
News and Views
Vol. 22, No. 31
August 4, 1983

The Board Governing the Recording of Judicial Proceedings, (CSR Board), has revoked the Certified Shorthand Reporter License of Ms. Wendy Tate, last known address 780-A Tramway Place, N. E., Albuquerque, New Mexico 87122.

WRITS OF CERTIORARI

Petitions for Writ of Certiorari Filed and Pending:

No. 15043 Mazer vs. Mansfield 7/22/83

Certiorari Granted and Under Advisement:

No. 14643 Safeco vs. USF&G
No. 14799 Perry Jackson vs. State
No. 14823 State vs. Swise
No. 14848 Lex Pro vs. Snyder Enterprises 4/11/83
No. 14859 State vs. McCormack 4/22/83
No. 14873 State vs. Gene Curtis Ballinger 4/22/83
No. 14875 Gomez vs. Glover Packing 4/22/83
No. 14909 Budagher vs. Amrep 5/17/83
No. 14927 Ealy vs. Sheppeck 6/2/83
No. 14938 Estate of John C. Brown vs. Diana May Beckham 6/2/83
No. 14939 David Mead vs. State of N.M. 6/2/83
No. 14941 State vs. Thomas M. Henry 6/2/83
No. 14950 State vs. Gerard Lopez 6/2/83
No. 14953 Toppino vs. Herhahn 6/2/83
No. 14958 State vs. Jane Doe 6/9/83
No. 14971 Segotta vs. State 6/23/83
No. 14972 State vs. Segotta & Mead 6/23/83
No. 14993 State vs. Michael L. Stoute 6/30/83
No. 14994 Carrie Tingley Hospital vs. Tafoya 6/30/83
No. 15001 State vs. Mark Douglas Fish 6/30/83
No. 15003 Ray Bell Oil vs. State 6/30/83
No. 15013 Michael Wilson vs. Charles Galt 7/22/83
No. 15028 Thomas vs. Grau 7/22/83
No. 15029 Steele vs. State 7/22/83
No. 15037 Vigil vs. Arzola 7/22/83

Petitions for Writ of Certiorari Denied:

No. 15002 George Cortez vs. State 7/22/83
No. 15012 Garcia vs. State 7/2/83
No. 15014 Williams vs. Moedl 7/22/83
No. 15015 Stevenson vs. Mazar 7/22/83
No. 15030 Mathews vs. Winn's Corp 7/22/83
No. 15031 Mansfield vs. Stevenson 7/22/83

Bulletin

ADVANCE OPINIONS OF
THE SUPREME COURT &
THE COURT OF APPEALS

From the New Mexico Supreme Court

HERBERT CHARLES BLATCHFORD, JR.,
Petitioner-Appellee,

versus

MACARIO GONZALES, Administrator, Forensic Hospital,
Respondent-Appellant.

No. 14361 (filed July 21, 1983)

APPEAL FROM DISTRICT COURT SAN MIGUEL COUNTY
DONALDO A. MARTINEZ,
District Judge

DONNA CHAVEZ
DONALD JUNEAU
Window Rock, AZ
for Appellee

JEFF BINGAMAN, Attorney General
EDDIE MICHAEL GALLEGOS, Assistant Attorney General
Santa Fe, N.M.
for Appellant

OPINION

E. VERN PAYNE, Chief Justice.

Blatchford, a Navajo Indian, was convicted of accessory to criminal sexual penetration and kidnapping of a Navajo Indian child, and sentenced to life imprisonment. He was confined to the state mental hospital in San Miguel County where he filed a petition for writ of habeas corpus. However, he failed to pursue his post-conviction remedies under NMSA 1978, Crim.P.R. 57(j) (Repl.Pamp.1980), before applying for the writ. The district court granted the writ over objections by the State that Blatchford failed to exhaust his remedies under Rule 57(j). In granting the writ, the court below held that the State did not have jurisdiction over Blatchford for a crime committed on Indian land. It reached this result by concluding that the situs of the offense is a dependent Indian community. We reverse on two grounds.

First, we hold that the district court is without jurisdiction to grant the writ of habeas corpus, given the fact that Blatchford failed to exhaust his post-conviction remedies.

Rule 57(j) states that "[a] prisoner must exhaust his remedy under this rule [Rule 57] before applying for a writ of habeas corpus." The main purpose of the rule is to provide a uniform procedure for determining if the prisoner is entitled to relief. It would be premature to hear applications for writs of habeas corpus if other post-conviction remedies are available.

Second, we hold that Yah-Ta-Hey, the community where the crime occurred, is not a dependent Indian community with exclusive federal jurisdiction. We will consider this issue to afford guidance in further considerations of this matter should Blatchford pursue other remedies.

I.

The offense occurred in the Yah-Ta-Hey community, located approximately two miles from the Navajo Indian Reservation. The general area surrounding Yah-Ta-Hey has become a "checkerboard area," resulting from a sequence of Federal withdrawals and expansions of Indian reservation lands, and has been the source of some confusion on matters of jurisdiction.

Although Yah-Ta-Hey is the site of an Indian trading post and other related businesses, the trading post is owned by non-Indians and the site is on land which had been granted in fee by the United States. Sixty to seventy percent of the community is Indian. As part of their benefits of membership in the tribe, Navajos in the vicinity vote in tribal elections. But they also vote in state and county elections. Since Yah-Ta-Hey is primarily a site for Indian trading, no federal services are administered there. A Navajo living in the area who desires such services must go either to nearby Rock Springs or to Crownpoint, forty miles away, given the fact that Crownpoint has jurisdiction over the Yah-Ta-Hey area for providing many Indian services. County and state police, as well as tribal police and FBI officers, patrol the Yah-Ta-Hey community. The Navajo Tribal Code recognizes the Yah-Ta-Hey area as within its jurisdiction and consequently has designated Yah-Ta-Hey as a Chapter where meetings and tribal businesses are conducted.

II.

Blatchford contends that the situs of the crime scene, Yah-Ta-Hey, is "Indian country" as defined by 18 U.S.C. Section 1151 (1976), so as to require exclusive federal jurisdiction under 18 U.S.C. Section 1153 (1976). We do not agree.

The term "Indian country" as used in Section 1151 includes Indian reservations, dependent Indian communities, and all Indian allotments. Since Yah-Ta-Hey is neither located on an Indian reservation nor on an allotment, jurisdiction rests on the claim that the area in question is a dependent Indian community within Indian country.

Section 1151(b) defines "Indian country" as:

> all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, . . .
>
> . .

The foregoing language resulted from two earlier Supreme Court decisions, United States v. McGowan, 302 U.S. 535

(1938) and **United States v. Sandoval**, 231 U.S. 28 (1913). These cases held that Indian country includes tribal Indian communities under federal protection that did not originate in either a federal or tribal act of reserving, or were not specifically designated a reservation. At the same time, it is apparent that Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap. **See United States v. McGowan**, 302 U.S. at 538-39; **see also** F. COHEN, **HANDBOOK OF FEDERAL INDIAN LAW** 38 (1982). Nevertheless, the appropriate test to determine whether a community is within the definition of Indian country under Section 1151 is not how the land was acquired, but whether the land has been **set apart** for use and occupancy of Indians. **United States v. McGowan**, 302 U.S. at 539; **United States v. Mound**, 477 F.Supp. 156 (D.S.D.1979); **Youngbear v. Brewer**, 415 F.Supp. 807 (D.N.D. Iowa 1976), **aff'd**, 549 F.2d 79 (8th Cir.1977); **State v. Youngbear**, 229 N.W.2d 728 (Iowa 1975); **cf. United States v. Sandoval**, 231 U.S. at 40 (noting that Congress reserved public lands for Indian use and occupancy); **accord United States v. Martine**, 442 F.2d 1022 (10th Cir.1971) (endorsing **Sandoval** approach).

Other important factors were outlined in **Martine** to include: 1) the area in question; 2) the relationship of the inhabitants of the area to Indian tribes and to the federal government; and 3) the established practice of the government agencies toward the area. **Id.** at 1023. Additionally, in **United States v. Morgan**, 614 F.2d 166 (8th Cir.1980), a relevant factor was "cohesiveness" manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality. **Id.** at 170. The crucial consideration, however, is whether the community or land has been **set apart** for use, occupancy and protection of dependent Indian peoples. **United States v. Mound**, 477 F.Supp. at 160. This crucial factor is nothing more than an expanded concept of the original definition of a dependent Indian community set forth in **McGowan** as a community in which the United States retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting [the] territory." **Id.** at 539.

Blatchford contends that Yah-Ta-Hey, although presently situated two miles outside the original boundaries of the Navajo Indian Reservation, was annexed to the reservation as a result of President Woodrow Wilson's Executive Order of 1917, which "set apart for the use and occupancy of the Navajo" and other Indians certain federal lands. **Executive Order No. 2513 of January 15, 1917.** He argues that aboriginal Indian title to the Yah-Ta-Hey area was never extinguished after the United States sold the land in 1866 to the Atlantic & Pacific Railroad Company and pledged to extinguish Indian title "as rapidly as may be consistent with public policy and the welfare of the Indians." Act of July 27, 1866, ch. 278, sec. 2, 14 Stat. 292 at 294. In addition, he argues that Indian title was not automatically extinguished in 1872, when the railroad line was definitely located. In short, Blatchford argues that the 1917 Order set the Yah-Ta-Hey area apart within the meaning of the test set forth in **McGowan** and its progeny, because aboriginal title to the area was never effectively extinguished. We disagree.

At the outset, we find error in the district court's finding that the 1917 Order encompassed the Yah-Ta-Hey area. The record shows that Yah-Ta-Hey is situated in Section 7 of Township 16 North, Range 18 West. We note that the 1917 Order embraced only three partial sections of Township 16 North, Range 18 West. **Landy v. Federal Deposit Insurance Corporation**, 486 F.2d 139, 151 (3rd Cir.1973), **cert. denied**, 416 U.S. 960 (1974) (noting that an appellate court can properly take judicial notice of any matter of which any court of original jurisdiction may properly take notice); **see also Varcoe v. Lee**, 180 Cal. 338, 181 P. 223 (1919). These scattered sections do not embrace or overlap Section 7. Thus, even assuming that aboriginal Indian title had never been extinguished, the 1917 Order did not embrace the Yah-Ta-Hey area so as to

set it apart for use and occupancy of the Navajo. Moreover, we find it difficult to conclude that an Executive Order, such as the 1917 Order, could validly set apart private fee land, given the well settled principle that the Executive may not act as lawmaker and take private property for public use. **Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579 (1952).

But even if we assumed, arguendo, that the 1917 Order did encompass the Yah-Ta-Hey area, Indian title to the area was nonetheless extinguished. Aboriginal Indian title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of land. **Johnson and Graham's Lessee v. M'Intosh**, 21 U.S. (8 Wheat.) 543 (1823); accord **United States v. Santa Fe Pacific R. Co.**, 314 U.S. 339 (1941); **Beecher v. Wetherby**, 95 U.S. 517, 525 (1877); **Buttz v. Northern Pacific Railroad Co.**, 119 U.S. 55, 66 (1886); **Fellows v. Blacksmith**, 60 U.S. 366 (1856); **United States v. Gemmill**, 535 F.2d 1145 (9th Cir.1976). The right to extinguish original Indian title rests exclusively with Congress irrespective of who holds the underlying fee title in the land. **Oneida Indian Nation v. County of Oneida**, 414 U.S. 661, 667-69 (1974); **United States v. Santa Fe Pacific R. Co.**; **United States v. Kabinto**, 456 F.2d 1087 (9th Cir.1972); **Narragansett Tribe, Etc. v. So. R.I. Land Devel.**, 418 F. Supp. 798 (D.R.I.1976). However, courts have required a showing of a clear and specific indication of congressional intent to extinguish Indian title. E.g., **United States v. Santa Fe Pacific R. Co.**; see **Tee-Hit-Ton Indians v. United States**, 348 U.S. 272, 277 (1955); **Buttz v. Northern Pacific Railroad Co.**, supra; **United States v. Pueblo of San Ildefonso**, 206 Ct.Cl. 649, 513 F.2d 1383 (1975).

Blatchford contends that the only possible evidence of any congressional intent to extinguish Indian title to the Yah-Ta-Hey area is the language of the Act of July 27, 1866, ch. 278, Section 2, 14 Stat. 294 (Act of 1866), which states in relevant part:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act. . . .

Blatchford argues that the foregoing language, in and of itself, does not necessarily mean that Indian title to the Yah-Ta-Hey area was automatically extinguished in 1872 when the railroad line was definitely located. We agree that the language of the Act of 1866 does not manifest any clear and specific congressional intent to extinguish Indian title to the Yah-Ta-Hey area, but hold that Congress has otherwise acted to extinguish Indian title to the land.

Although "extinguishment [of Indian title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards," **United States v. Santa Fe Pacific R. Co.**, supra, at 354, when the government clearly intends to extinguish Indian title the courts will not inquire into the means or propriety of the action:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues. [Citation omitted.] As stated by Chief Justice Marshall in **Johnson v. M'Intosh** [citation omitted], "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. [Citation omitted.]

Id. at 347. The relevant question, therefore, is whether there was any governmental action intended as a revocation of Indian occupancy rights.

Although the Navajos in 1867 were brought back from Bosque Redondo to an area that includes northwest New Mexico, the "tribe's traditional and historic hunting grounds, pasture, residency and occupancy," the Navajos were a conquered nation, forcibly removed "by sword" from their lands.

See, e.g., I COAN, A HISTORY OF NEW MEXICO, at 126-27 (1925). In 1868, a treaty was entered into by and between the United States and the Navajos to establish a reservation for the Navajos. Treaty with the Navajo Indians, June 1, 1868, United States-Navajos, 15 Stat. 667. Article IX of that treaty stipulated:

> [The Navajos] will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation.

Id. at 670. By Article XIII of the Treaty, the Navajos agreed to "make the reservation . . . their permanent home," and not to "make any permanent settlement elsewhere. . . ." Id. at 671.

From the foregoing treaty provisions, it is clear that Indian title to the Yah-Ta-Hey area, and other areas surrounding the reservation, was extinguished as pledged by Congress in the Act of 1868. **Accord United States v. Santa Fe Pacific R. Co.** (Requesting and accepting a new reservation tantamount to an extinguishment by "voluntary cession" within the meaning of same Act). **Buttz v. Northern Pacific Railroad Co.** (Indian title extinguished because, among other things, the Indians "retired" from the occupancy of the lands outside the reservation to the reservation set apart for them by treaty). Further, the military action of the government in forcibly removing the Indians to and from Bosque Redondo prior to signing the treaty is a strong indication of the sovereign's intent to revoke the Navajo rights of permissive occupancy in and around the area in question. **See United States v. Santa Fe Pacific Railroad Co.; see also United States v. Gemmill.**

From the foregoing, we conclude that Yah-Ta-Hey is not a valid extension of the 1868 Navajo Indian Reservation, and as such has not been validly set apart for the use and occupancy of the Navajo and other Indians within the meaning of **McGowan** and its progeny. Such a conclusion is a significant factor in determining that Yah-Ta-Hey is not a dependent Indian community. **United States v. Mound,** 477 F.Supp. at 160. Hence, the crime did not occur in Indian country.

III.

Had the crime been committed in Indian country, we would have been required to hold that the original state court lacked jurisdiction to try and convict Blatchford, as the State of New Mexico has not accepted jurisdiction of such lands under Public Law 280 or any other federal statute. On its face, NMSA 1978, Section 31-10-3 seems to indicate a conflict on this issue which we discuss.

Congress enacted the Act of August 15, 1953, Public Law 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. Section 1162, 28 U.S.C. Section 1360), which delegated to six states jurisdiction over most crimes and many civil matters arising on Indian country within their borders. New Mexico was not among these six states. Nevertheless, Section 6 of the original Act gave the consent of the United States to any state to amend "where necessary" its state constitution **or** statutes to remove "any legal impediment" to the assumption of jurisdiction under the Act. The basis for this section was that the eleven states admitted to the Union after 1889 were required to disclaim jurisdiction over Indian lands as a condition of their admission. **See Dick v. United States,** 208 U.S. 340 (1908); **see also** F. COHEN, **supra,** at 398. This section, of course, applied to New Mexico, and as a result, New Mexico inserted such a disclaimer in its constitution. N.M. Const. art. 21, sec. 2.

In light of the fact that several other "disclaimer" states have acted legislatively to accept some jurisdiction under Public Law 280 without an amendment to their state constitutions (these states include Arizona, Idaho, Montana, North Dakota, South Dakota, Utah, and Washington), the question arises whether New Mexico has accepted jurisdiction under the Act pursuant to Section 31-10-3, which states:

> All Indians, committing against the person or property of another Indian, or other person, any of the following crimes, namely: murder, manslaughter, criminal sexual penetration, assault with intent to

kill, arson, burglary and larceny, within the state of New Mexico and either within or without an Indian reservation, shall be subject therefor to the laws of this state relating to such crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties as are all persons charged with the commission of such crimes, respectively, and the courts are hereby given jurisdiction in all such cases. [Emphasis added.]

The language of the statute clearly purports to grant jurisdiction to the state courts for crimes over which the federal courts would otherwise have exclusive jurisdiction. See 18 U.S.C. Section 1153 (1976). Section 31-10-3 was, however, originally enacted in 1889, and has incurred very little change through subsequent codification and compilation. Hence, it can hardly be said that Section 31-10-3 was enacted in response to the invitation of Public Law 280, permitting the State to assume either criminal or civil jurisdiction over Indians in Indian country. Neither has there been any other federal jurisdictional grant of authority. As we stated in Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977):

> [T]he New Mexico Enabling Act . . . disclaimed jurisdiction over the Indians. The State of New Mexico has declined to assume jurisdiction over the Indian reservations within the state by failing to take affirmative steps under Public Law 280, enacted by Congress in 1953, or under more recent congressional acts.

Id. at 206 [footnotes omitted]. See Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961).

However, because we have concluded that the crime did not occur in Indian country, we hold that Blatchford was properly tried and convicted in the original state court below. Accordingly, we reverse the district court's order granting Blatchford's writ of habeas corpus.

Reversed and remanded.

IT IS SO ORDERED.

s/N. VERN PAYNE, Chief Justice

WE CONCUR:
s/WILLIAM F. RIORDAN, Justice
s/HARRY E. STOWERS, Justice

OPINION

N. VERN PAYNE, Chief Justice.

This appeal arises from a suit for dissolution of marriage. While married, the parties entered into a written agreement which purported to divide, inter alia, their community interest in the family residence, transmute the community interest in husband's retirement funds into his own separate property, and require each party to give their child $5,000 upon the sale of the family residence. The

No. L-357-371

STATE OF NEW MEXICO COUNTY OF SAN MIGUEL

IN THE DISTRICT COURT, FOURTH JUDICIAL DISTRICT

HERBERT CHARLES BLATCHFORD, JR.

Petitioner,

vs.

MACARIO GONZALES, ADMINISTRATOR, FORENSIC HOSPITAL,

Respondent.

FILED IN MY OFFICE
4:21 p.m.
MAY 6 1982
DOLORES G. MARTINEZ
DISTRICT COURT CLERK
By Bruce Martinez Deputy

No. 82-36-CV

D E C I S I O N

This cause duly came on to be heard upon the Writ and the Return thereto, and upon Respondent's motions; petitioner appeared in person and by his attorneys Patricia Glazek and Forrest Buffington; respondent appeared by Eddie M. Gallegos, Assistant Attorney General; the court having heard the motions and the arguments thereon and, having taken the same under advisement, then heard and considered the testimony, evidence, exhibits and arguments of the parties; and, further, having considered the statutes, the historical background of the factual issues, and the legal authorities cited, and having done additional and extensive research on said matters, and being now fully advised, informed and satisfied in the premises, FINDS

1. The issues raised herein were not raised on appeal.

2. There is a substantial dispute as to the factual issues concerning whether or not the situs of the offense of which petitioner was convicted was "Indian County", i.e., within an Indian Reservation or in a "dependent indian community". (18 U.S.C.S. 1151, 1152, 1153)

3. The issues raised herein go to the jurisdiction of the

court in which petitioner was convicted and given the sentence under which he is presently held.

4. Rule 57, N.M.R.C.P. is not a substitute for Habeas Corpus, nor does it limit, abridge or abrogate the right to the writ. It provides an additional, simplified remedy which must be pursued where adequate and effective under the circumstances. Here, with the petitioner imprisoned in a mental care institution far removed from the locale of the trial court, a rule 57 procedure would be of doubtful adequacy and efficacy.

5. Petitioner is presently held at the Forensic Treatment Unit of the New Mexico State Hospital at Las Vegas, San Miguel County, New Mexico, under a sentence imposed upon him on conviction of a crime committed within Section 7, T. 16 N. R. 18 W., in McKinley County, New Mexico. This court has jurisdiction of the subject matter and the parties.

The court, therefore, DENIES respondents motions to dismiss, and for summary judgment.

6. Petitioner is a member of the Navajo Indian Tribe, enrolled and registered both with the Tribe and the United States Bureau of Indian Affairs.

7. The offenses of which petitioner was convicted, namely, Accessory to Criminal Sexual Penetration of a child and to Kidnapping, were committed by and between members of the Navajo Indian Tribe.

8. The offenses of which petitioner was convicted occurred in the Yah-Ta-Hey community which is located on and in Section 7, T. 16 N., R. 18 W., and which consists of a cross-roads trading post and service area at the junction of U.S. 666 (which crosses the Navajo Reservation from north to south) and State Road 68 (which leads west and across allotted Indian Lands from said U.S. 666). Other roads leading to and serving the Navajo Reservation and related Indian Lands connect to said U.S. 666 and State Road 68 in the immediate or near vicinity of said junction.

9. The entire area surrounding Yah-Ta-Hey junction for many miles around consists of Indian Lands interspersed with a few sections of fee land (mostly Railroad sections), Indian allotments homsteads and state lands. Yah-Ta-Hey is located in a section that is immediately completely surrounded by allotted Indian Lands.

10. Yah-Ta-Hey is located approximately two miles south of the original boundary of the 1868 Navajo Indian Reservation and about six-and-a-half miles north of the City of Gallup, New Mexico.

11. The 1868 Navajo Indian Reservation is the core of a vast area of Indian Lands, settlements and population which stretches across the Northwest corner of New Mexico and the Northeast corner of Arizona, and laps over into the states of Colorado and Utah.

12. The Navajo Reservation was established by a treaty executed in 1868 between the Navajo tribe and the United States. It has subsequently been enlarged and alternately diminished by Executive Orders of various United States Presidents.

13. The said treaty of 1868 was reached at a time when, as a consequence of the anti-slavery sentiments of the American civil war era, there was widespread "concern for the other oppressed and wronged racial minority, the Indians." General William T. Sherman, with whom the treaty was negotiated, himself expressed sympathetic concern for the impoverished plight of the Indians resulting from the loss or diminishment of their lands due to the "construction of two parallel railroads right through their country". (Prucha, AMERICAN INDIAN POLICY IN CRISES, Univ. of OKL. 1976, pp. 4,5)

14. This consciousness of wrongs against the Indians was so strong at that time that President Lincoln himself commuted the sentences of all but 39 of the 307 Sioux Indians who had been sentenced to death by a military court following the Sioux uprising of 1862 (Prucha, id., p. 8)

15. This same consciousness was further accented by news of the Sand Creek Massacre in Colorado of peaceful Cheyennes at the hands of troops under the command of Colonel John M. Chivington on November 29, 1864. (Prucha, id., pp. 11-13)

16. As a consequence of subsequent hostilities between the Indians and the westward wave of white expansion and settlement, and of an expressed desire for a just and peaceful settlement of the Indian problems, the U.S. Congress on July 20, 1867, authorized the creation of a Peace Commission to identify the reasons for the difficulties and to make treaties which would remove "all just causes of complaint". They were to "select reservations which would become the permanent homes for the Indians and from which all whites were to be excluded". (Emphasis added)

17. General William T. Sherman and six others were the members of the commission, and they commenced their endeavors at Fort Larned on the Arkansas River in present day Kansas by trying to meet there with the various Plains Indian tribes and chiefs in order to effect the desired treaties. These efforts resulted in the October, 1867, treaty of Medicine Lodge which provided that the Indians were to move to areas set aside for them in "Indian Territory", stop killing whites, and stop molesting travelers crossing the plains, and not impede the building of military posts and railroads. They were to be given protection, rations, supplies, farming gear, schools, teachers, doctors and artisans, as well as reservations and supplementary hunting grounds. Those who wished to become farmers were each to receive 320 acres of land, but the government was to retain title as guardian. Similar provisions were incorporated in the Navajo Treaty of 1868, (Nye, p. 109,) The Plains Indians kept this pe temporarily, but took out their frustrations by attacks on the Navajos and other tribes.

18. The 1868 treaty with the Navajos, effected with General Sherman, resulted from the work of the 1867 Peace Commission. (Prucha, id. pp. 18-23)

19. A Board of Indian Commissioners was then established by Congress on April 10, 1869, to oversee new programs for the benefit of Indians being then placed on reservations. (Prucha, pp. 33,46)

20. During the adminstration of President Grant a policy of substituting or replacing the previous civilian and military Indian Agents with missionaries was inaugurated. (Prucha, id. pp. 46-60) He effected a change in the policy of appointing political worthies as Indian agents and superintendents, giving those posts to Quakers, missionaries and others recommended because of their sympathetic feelings toward the Indians. He also appointed a full-blooded Indian, Ely S. Parker, as Commissioner of Indian Affairs. Nye. Plains Indian Raiders. (Univ. of Okl., Norman 1868, p. 140)

21. On March 3, 1871, the United States Congress enacted a provision abolishing the practice under which the federal government had till then used treaties to deal with the Indians, but preserving the validity and the obligations of existing treaties. (Prucha, id. pp. 63-71) Thus, the Navajo Treaty of 1868 was confirmed, ratified and perpetuated.

22. Petitioner Blatchford is a member of the Navajo Indian Tribe.

23. The Navajo Indians have at all times material hereto maintained their identity and integrity as an integrated Indian tribe.

24. The Navajo tribe of Indians now reside on lands which were their traditional and historic area of hunting, residence and occupation even before the arrival of Europeans, either from Spain, Mexico or the eastern United States.

25. The traditional and historic area of Navajo residence and

occupation in northeast Arizona and northwest New Mexico was finally usurped by conquest by United States military forces under command of Kit Carson in 1863, at which time these Indians were removed from their homelands and taken on the infamous "long walk" to "El Bosque Redondo" near Ft. Sumner, New Mexico, where the United States endeavored to establish them as farmers on the Pecos River.

26. The effort to establish the Navajos at Bosque Redondo failed, and the 1868 Treaty was then effected between the tribe and the agent of the United States, General William T. Sherman. By its terms a reservation of three and one-half million acres in northwest New Mexico and northeast Arizona was established. This acreage was in the area of the tribe's traditional and historic hunting grounds, pasture, residency and occupation, but not as widespread, and upon their return to the area many tribesmen nevertheless continued to live in, hunt, fish and pasture on areas of their former traditional and historic lands, even beyond the limits of the treaty reservation.

27. In recognition of this expanded use and occupancy, and partly due to the tribe's need for additional lands (because of overgrazing, drought, erosion and population increases, as well as the establishment of Railroad lands, statelands, federal Public Domain, National Parks, Homesteads, etc.) and a continuing decrease in the "open" areas of expanded use, the federal government expanded the reservation by a succession of executive orders, and by 1930 the area totaled over 14 million acres. These enlargements mostly took in areas already generally occupied or used by Navajos, Ruth Underhill, THE NAVAJOS (Norman Okl. 1956).

28. In addition to the expansion of the reservation, many tribe members received allotments adjacent to or near the reservation under various federal enactments, but they remained under supervision of the Bureau of Indian Affairs of the United States Department of the

Interior, and continued as active members of the Tribe.

29. The federal government has established and maintained a Navajo Agency through which it supervises its programs and the tribe's activities. The agency was originally headquartered at Ft. Defiance in the state of Arizona. At the turn of the twentieth century the agency was decentralized and six superintendencies, were established. An eastern district headquarters, which has responsibility for the area in question herein, was and is located at Crownpoint, a community located off the reservation itself but within the area of expanded use and alloted Indian lands. (Checkerboard area.)

30. By Executive Order of November 9, 1907, President Theodore Roosevelt expanded the Navajo Reservation to include, and did thereby include, the Crownpoint - Chaco Canyon - Hosta Butte Area; which expansion embraced the area of the lands at issue herein. This additional area, except for lands meanwhile alloted to Indians, was subsequently withdrawn from the reservation and restored to the public domain by Executive Order of President Taft dated January 16, 1911. On January 15, 1917, President Woodrow Wilson withdrew from entry and settlement and sale, and "set apart for the use and occupancy of the Navajo" and other Indians a vast area of federal lands not previously alienated or alloted. This order restored to "use and occupancy" by the Navajos, and other Indians, virtually all of the lands in New Mexico originally included in President Theodore Roosevelt's Executive Order of November 9, 1907. The lands at issue herein are within the area encompassed by these said orders, but the particular section in question had by then become patented Railroad lands.

31. The area in New Mexico known as the "checkerboard area" (meaning an alternating, inconsistent, crazy-quilt pattern of federal,

state, homstead and Indian lands) resulted from this sequance of withdrawals, restorations, expansions and diminishment of Indian lands, but even though some tracts within the general area are held and occupied in fee by a few non-Indians, the general area consists of lands occupied, used and/or owned by dependent Navajo Indians.

32. The Crownpoint office of the Navajo Indian Agency still administers the affairs of the Navajos in this area of what the Court will call the extended Navajo country.

33. The Yah-Ta-Hey location in Section 7, T. 16 N., R. 18 W., is well within this area of the extended Navajo country. This is a patented railroad section, but has long been, and is presently, used as the site of an Indian Trading Post (Tanner's Trading Post) and related service business activities.

34. Indian Traders are licensed, regulated and established by the federal government, and only those so authorized by the United States may engage in that endeavor. (25 U.S.C.S. 261, U.S. v. Cisna, (1835 C.C. Ohio))

35. Appointments as Indian Traders have traditionally provided opportunities for quick wealth, and the positions have been much sought after by persons with political influence. Secretary of War Beklnap was impeached in 1876 for selling such appointments. The Indians were extensively victims of unscrupulous Traders whose chicanery and sharp practices caused them harships and discontent, and made it very difficult for them to continue to live peacefully on their assigned reservations. (Nye, p. 159)

36. Navajos living within the extended Navajo area are under and subject to the jurisdiction of the eastern district of the Navajo Indian Agency.

37. The Yah-Ta-Hey community is within the area known as the

Rock Springs Community, and it is a recognized area of use, residence and/or occupation by dependant Navajo Indians.

38. The State of New Mexico has not exercised its option to acquire civil and criminal jurisdiction over Indian Country.

39. The executive orders by which the expanded Navajo reservation was re-opened for homestead entry did not specifically terminate or diminish the expanded reservation status of the public lands therein.

40. In the days of the administration of President Hoover, there was an effort in Congress to establish by special legislation a clear, contiguous and definite boundary for the Navajo Reservation. This effort was sponsored by Senators Carl Hatch of New Mexico and Carl Hayden of Arizona. In the early days of President Franklin D. Roosevelt's administration the legislation was successfully enacted for that area of the Navajo lands located in the State of Arizona. Although land trades, agreements and general consensus for similar legislation for the New Mexico area had also been reached, the legislation never actually passed the United States Senate because of opposition from "modern" Navajos and others who wanted reservation status ended (rather than expanded or confirmed) so that the lands could be divided in severalty amongst the tribesmen. This, so that they might supposedly attain full assimilation as ordinary, independent citizens. The failure of this legislation confirmed and continued the status of the Navajos as a "dependent Indian Community." (Parman, THE NAVAJOS AND THE NEW DEAL, Yale University Press, 1976)

41. In preparation for the settlement and establishment of the boundary line set out in the proposed boundary legislation, Interior Secretary Ickes in 1931 withdrew most of the checkerboard area from homestead entry. After the failure of the boundary-setting

legislation, the expanded area was administratively established as Grazing District No. 7 under the Taylor Grazing Act, brought under special federal control, and it remained closed to further entry until 1960, when some limited parts of the easternmost and southerly portions of the expanded area were again re-opened. These activities establish that Congress has continued to deal with the area as a recognized location of "Indian lands".

42. It is settled that executive orders and congressional acts opening Indian reservations to entry and allotment do not terminate the reservation status of the lands, and such lands remain "Indian country" under 18 U.S.C.S., 1151, Mattz v. Arnett, 412 U.S. 481, 37 L.Ed 2d 92, 92 S. Ct. 2245 (1973).

43. The Yah-Ta-Hey area is within the boudaries set and recognized by the Tribal ordinance adopting the Navajo Tribal Code.

44. The federal government has divided the expanded Navajo reservation into named units and/or communities for purposes of federal administration, amongst which are the Tsayatoh Community, the Churchrock Community, the Pinedale Community, the Wingate Community, the Red Rock Community and the Manuelito Community. These mentioned communities include the Yah-Ta-Hey area which is located within the designated area of the Rock Springs Community.

45. With the approval and consent of the United States, the Navajos have divided their areas of expanded use and occupation into 107 chapters, which are places with designated meeting places for the conduct of tribal business at the local level, and Yah-Ta-Hey is a designated chapter, and a specific meeting place. The Navajo Indians of the area receive tribal benefits, and the expenses of their political and governmental affairs, such as police protection, law enforcement, road maintenance, health-care, housing, schools, emergency assistance, and others, are funded through joint federal

and Navajo funds. There are approximately 200 Navajos and 60 to 70 non-Navajos residing in the Yah-Ta-Hey area. The business places in the Yah-Ta-Hey area are owned by whites but patronized by Navajos. The Navajos in this chapter are entitled to vote for and elect two members of the Navajo Tribal Council. Their waters come from and through alloted Navajo Indian water rights.

FROM THE FOREGOING FINDINGS, THE COURT CONCLUDES:

1. This Court has jurisdiction of the parties hereto and the subject matter hereof.

2. Yah-Ta-Hey is geographically located within Indian Country, is part of a Dependent Indian Community, and Navajo Indians therein are subject to the administration of the Navajo Indian Agency of the Bureau of Indian Affairs of the United States Department of the Interior.

3. The federal congress has reserved to itself exclusive jurisdiction to try crimes committed by Indians against Indians in such Indian Country and Dependant Indian Communities, and the State of New Mexico has not acted to expand its jurisdiction over such offenses committed in such areas.

4. The Navajo Indians are still under the care, guardianship and tutelage of the United State Government, and petitioner is himself one of the dependent Navajo Indians.

5. The District Court in McKinley County had no jurisdiction to try petitioner, or to sentence him, for the offense charged. (it having been stipulated that the offense occurred at the said Yah-Ta-Hey trading post area and community by and between Navajo Indians).

6. The petitioner should be forthwith released and discharged.

DONE at Las Vegas, New Mexico this 5th day of May, 1982.

Donald Martinez

DISTRICT JUDGE
DIVISION II

B I B L I O G R A P H Y

ARTICLES

Nye. Plains Indian Raiders: University of Oklahoma, Norman: 1868

Parman. The Navajo And The New Deal: Yale University Press: 1976

Prucha. American Indian Policy In Crisis: University of Oklahoma: 1976.

Underhill, Ruth. The Navajos: Normal Oklahoma: 1956.

CASES

Donnelly v. United States, 228 U.S. 243, 57 L.Ed 820. 263-270

Ex Parte BI-A-LIL-LE, 100 Pacific Reporter, p. 450 (12 Ariz. 50)

Ex Parte: In the Matter of Kang-Gi-Shun-Ca, Supreme Court Reporter's ed. 556-572

Ex Parte Van Moore, 221 Federal Reporter, p. 954.

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Paul Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 7 L.Ed 2d 346, 82 S. Ct. 424.

Pleasant Draper v. United States, Supreme Court Reporter's ed. 240-247.

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The Navajo Tribe of Indians v. Ida Holyan, 1 Nav. R. 78.

United States v. Bob Celestine, Supreme Court Reporter's ed. 278-291.

United States v. Cisna, (1835, C.C. Ohio) F. Cas No. 14,795.

United States of America v. Pete McGowan, 302 U.S. 535-540.

United States v. Anthony Robert Wheeler, 435 U.S. 313, 55 L.Ed 2d 303, 98 S. Ct. 1079.

United States v. Felipe Sandoval, 231 U.S. 28.

United States v. Kagama, alias "Pactah Billy" and Mahwaha, alias "Ben", Supreme Court Reporter's ed. 375-385.

United States v. Martine, 442 F.2d 1022 (1971).

United States v. Mound, 477 F. Supp. 156 (1979).

United States v. Sam Pelican, Supreme Court Reporter's ed. 442-452.

Johvowan v. Luce, (291 F.)

NEW MEXICO CASES

Chino v. Chino, 90 N.M. 204, 561 P.2d 476.

Sangre De Cristo Development Corp. v. City of Santa Fe, and Board of County Commissioners of Santa Fe County, New Mexico, 84 N.M. 343, 503 P.2d 323.

State of New Mexico v. John Paul Cutnose, 87 N.M. 307, 532 P.2d 896.

Your Food Stores, Inc. (NSL) v. Village of Espanola,
68 N.M. 327, 361 P.2d 950.

UNITED STATES CODE SERVICE

18, U.S.C.S., Section 1151, 1152, 1153.

25, U.S.C.S., Section 261.

ORDINANCE

The Navajo Tribal Code, T. 7 § 253, Ch. 3, pp. 288-290.

STATE OF NEW MEXICO COUNTY OF SAN MIGUEL

IN THE DISTRICT COURT, FOURTH JUDICIAL DISTRICT

HERBERT CHARLES BLATCHFORD, JR.,)
)
Petitioner,)
)
vs.)
)
MACARIO GONZALES, ADMINISTRATOR)
FORENSIC HOSPITAL,)
)
Respondent.)

FILED IN MY OFFICE
MAY 25 1982
No. 82-36-CV

JUDGEMENT ON HABEAS CORPUS

This matter having been heard on the writ of habeas corpus allowed herein, and on the return thereto; the court having heard attorneys Patricia Glazek and Forrest Buffington on behalf of petitioner, and Assistant Attorney General Eddie Gallegos on behalf of Respondent; having duly considered the testimony, evidence, exhibits and authorities, having given the parties time to submit additional exhibits, authorities, points, and findings and conclusions; having entered its own findings and conclusions, and having afforded the parties time to study and consider the same; NOW, IT APPEARING THAT HERBERT CHARLES BLATCHFORD, JR., IS ILLEGALLY IMPRISONED AND DETAINED BY YOU, Respondent, as specifically found and determined in the decision heretofore made and entered herein, and particularly, that no legal cause for such imprisonment and detention has been shown; and the court finding and concluding that said Herbert Charles Blatchford, Jr., is not detained by virtue of a final judgement, conviction or degree of a court of competent jurisdiction, or by virtue of any execution issued upon any such judgement, conviction or decree, and it being proper;

IT IS HEREBY ORDERED that Herbert Charles Blatchford, Jr., be discharged from the custody of Respondent Macario Gonzales, and from further detention and confinement by the State of New Mexico and its agents, who, with Respondent Macario Gonzales, are hereby

directed forthwith to release and discharge Herbert Charles Blatchford, Jr., from said imprisonment and restraint, all pursuant to section 44-1-15, N.M.S.A., 1978 Comp., and Article II, Sec. 7, New Mexico Constitution.

DATED this 25th day of May, 1982.

Donaldo A. Martinez

DONALDO A. MARTINEZ
DISTRICT JUDGE DIVISION II
DISTRICT COURT OF THE STATE OF
NEW MEXICO, FOURTH JUDICIAL DISTRICT

SUPREME COURT OF NEW MEXICO

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

HERBERT CHARLES BLATCHFORD, JR.,

Appellee and Petitioner,

-vs-

No. 14,361

On Appeal From The
District Court of
San Miguel County

VACANIO GONZALES,
Administrator, New Mexico
Forensic Hospital,

Appellant and Respondent.

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Pursuant to Rule 10 of the Supreme Court of the United States and 28 U.S.C. §2101(c), appellee HERBERT CHARLES BLATCHFORD, JR., hereby appeals to the Supreme Court of the United States from a judgment of this Court entered on July 31, 1989, reversing and remanding a judgment in favor of Appellee by the Fourth Judicial District Court of the State of New Mexico, in and for the County of San Miguel.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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DONNA C. CHAVEZ
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Post Office Box 662
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OCT 12 1989
Dated

By: Donald Juneau
DONALD JUNEAU
Attorneys for Appellee
Herbert Charles Blatchford, Jr.

Proof of Service

October 12 1981

October 12 1981

Under authority of the act of Congress approved June 25, 1910 (36 Stat., 847), and on the recommendation of the Secretary of the Interior it is hereby ordered that all of township 5 south, range 7 east, Gila and Salt River meridian, Arizona, except such portions thereof as have been heretofore reserved and set aside as an addition to the Gila River Indian Reservation, be temporarily withdrawn from settlement, location, sale, or entry, except as provided in said act, and be reserved for classification.

WM. H. TAFT.

THE WHITE HOUSE, *December 16, 1911.*
(No. 1447.)

It is hereby ordered that the following-described tract of country in the Territories of Arizona and New Mexico, viz:

Commencing at a point where the east line of the Navajo Indian Reservation, as at present constituted, intersects the north boundary of township 23 north, range 13 west, New Mexico meridian; thence due east to the northeast corner of township 23 north, range 5 east; thence south to the southeast corner of township 17 north, range 5 east, New Mexico meridian; thence west to the first guide meridian; thence south on the said guide meridian to the southeast corner of township 15 north, range 9 west; thence west to the southwest corner of township 15 north, range 14 west; thence north to the northwest corner of township 15 north, range 14 west; thence due west to the boundary line between the Territories of Arizona and New Mexico; thence south on the boundary line between the Territories of Arizona and New Mexico to the northeast corner of township 23 north, range 31 east; thence west to the northwest corner of township 23 north, range 29 east; thence south to the northwest corner of township 21 north, range 29 east; thence west to the northwest corner of township 21 north, range 29 east; thence west to the northwest corner of township 21 north, range 26 east; thence south to the southeast corner of township 21 north, range 25 east; thence west to the southwest corner of township 21 north, range 22 east; thence due north to the southern boundary of the Navajo Reservation, as at present constituted, be, and the same is hereby, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any person.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 9, 1907.*
(No. 709.)

Whereas it is found that the Executive order of November 9, 1907, setting apart certain lands in Arizona and New Mexico as an addition to the Navajo Indian Reservation, conflicts in part with Executive order of November 11, 1907, setting apart certain lands as an addition to the Jicarilla Indian Reservation, N. Mex., said Executive order is hereby so amended that the description of the tract of land set apart as an addition to the Navajo Reservation shall read as follows:

Beginning at a point on the eastern boundary of the Navajo Reservation where it intersects what would be, if extended, the township line between townships 23 and 24 north; thence east along said township line between townships 23 and 24 north to the northeast corner of township 23 north, range 6 west, New Mexico meridian; thence south to the northeast corner of township 21 north, range 6 west; thence east to the northeast corner of township 21 north, range 5 west; thence south to the southeast corner of township 17 north, range 5 west; thence west to the first guide meridian west; thence south on said guide meridian to the southeast corner of township 15 north, range 9 west; thence west along the township line between townships 14 and 15 north to the northwest corner of township 15 north, range 14 west; thence west along the township line between townships 15 and 16 north to the boundary line between the Territories of Arizona and New Mexico; thence south on said boundary line to the northeast corner of township 23 north, range 31 east, Gila and Salt River meridian, Arizona; thence west on the township

line between townships 23 and 24 north to the northwest corner of township 23 north, range 29 east; thence south to the northwest corner of township 21 north, range 29 east; thence west on the township line between townships 21 and 22 north to the northwest corner of township 21 north, range 26 east; thence south to the southeast corner of township 21 north, range 25 east; thence west on the fifth standard parallel north to the southwest corner of township 21 north, range 22 east; thence north on the range line between ranges 21 and 22 east to its intersection with the south boundary of the Hopi (Moqui) Indian Reservation, Ariz.; thence east to the southeast corner of said Hopi (Moqui) Reservation; thence north on the 110° of longitude west to the south boundary of the Navajo Reservation, Ariz.; thence east along the said south boundary to the boundary line between Arizona and New Mexico; thence continuing east along the boundary line of the Navajo Reservation, N. Mex., to the southeast corner of said reservation; thence north along the east boundary of said Navajo Reservation to the place of beginning.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *January 23, 1908.*
(No. 744.)

ZUNI NATIONAL FOREST, ARIZONA AND NEW MEXICO.

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11, at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Zuni National Forest, Arizona and New Mexico, as proclaimed March 2, 1909, and modified by subsequent proclamation of July 1, 1910, be further modified by excluding therefrom those parts of the Zuni and of the Navajo Indian Reservations included in said national forest by the said proclamation of March 2, 1909, except those parts of the said Navajo Indian Reservation described in Executive order No. 1284 of January 16, 1911, and included in said Zuni National Forest by said proclamation of March 2, 1909, which are hereby retained as national forest land.

The purpose of this exclusion is to restore in all respects the Zuni Indian Reservation and that part of the Navajo Indian Reservation not affected by Executive order No. 1284 of January 16, 1911, to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Zuni National Forest had not been ordered, and said Indian reservations are hereby fully recreated and restored to that status, with the exception above mentioned.

WM. H. TAFT.

THE WHITE HOUSE, *February 17, 1912.*
(No. 1432.)

It is hereby ordered that the following described lands in Pima County, Ariz., be, and they are hereby, reserved from settlement, entry, sale, or other disposal and set aside for school, agency, and other necessary uses for the benefit of the Papago Indians, subject to any valid existing rights of any persons thereto:

SE. ¼ of the SE. ¼ of sec. 25, T. 17 S., R. 4 E.; S. ½ of NE. ¼ of SW. ¼; S. ½ of SW. ¼ of SW. ¼ and NW. ¼ of SW. ¼ of SW. ¼ of sec. 30, T. 17 S., R. 5 E.

Beginning at SW. corner of the NW. ¼ of the SW. ¼ of section 30, T. 17 S., R. 5 E.; thence east 2.5 chains; thence north 20 chains; thence west 2.5 chains; thence south 20 chains to the place of beginning.

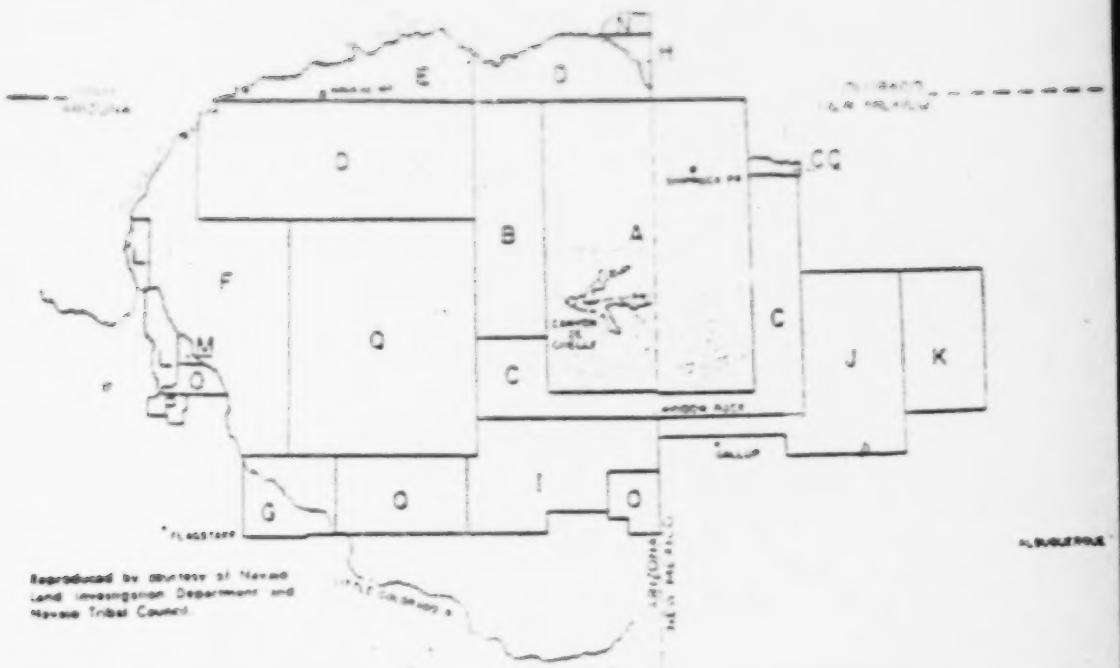
N. ½ of the NW. ¼ of sec. 7, T. 21 S., R. 6 E., of the Gila and Salt River meridian, Arizona.

WM. H. TAFT.

THE WHITE HOUSE, *June 16, 1911.*
(No. 1374.)

It is hereby ordered that the following described lands in the State of Arizona, viz, all of sections 1 and 12, in township 1 north, range 4 east, of the Gila and Salt River meridian, be, and the same are hereby, withdrawn from settlement, entry,

BOUNDARIES OF THE NAVAJO RESERVATION



A	Original treaty reservation. June 1, 1868.
B	Executive-order addition. October 29, 1878.
C	Executive-order addition. January 6, 1880.
CC	Originally a part of "C"; withdrawn from the reservation by executive order, May 17, 1884; restored by executive order, April 24, 1886.
D (two parts)	Executive-order addition. May 17, 1884.
E	The Paiute Strip. Originally a part of "D", in 1872 restored to the public domain; in 1908 withdrawn for the use of various Indians, restored to public domain in 1922, in 1929 again withdrawn from entry; 1933 transferred permanently to the Navajo reservation.
F	Executive-order addition. January 8, 1900.
G	Executive-order addition. November 14, 1901.
H	Executive-order addition. March 10, 1905.
I	Executive-order addition. November 9, 1907.
J	Executive-order addition. November 9, 1907, restored to public domain by executive order of January 16, 1911.
K	Executive-order addition. November 9, 1907, restored to public domain by executive order of December 30, 1908.
L	Tusayan Forest addition. Act of May 23, 1930.
M	Executive-order addition. May 7, 1917.
N	Act of March 1, 1933.
O (three parts)	Arizona Boundary Act of June 14, 1934.
P	Tusayan Forest addition. Act of February 21, 1933.
Q	Hopi reservation. Executive-order reservation created on December 16, 1882.

Appendix E

NEW MEXICO
R. 19 W.
R. 18 W.
R. 17 W.
INDIAN
STANDARD
T. 16 N., R. 18 W., N.M.P.M.
WEST
MERIDIAN
Southern boundary of E.O. 709 Reservation
Allison
Gallup
Manuelito
TWIN BUTTES
Rehoboth
GUILDE
REMNANT MESA

Appendix F

Supreme Court, U.S.
FILED
DEC 15 1983
ALEXANDER L. STEVAS
CLERK

No. 83-5517

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERBERT CHARLES BLATCHFORD, JR.,

Appellant,

vs.

HARVEY WINANS, Warden of the
New Mexico State Penitentiary,

Appellee.

On Appeal From The Supreme Court
Of The State of New Mexico

MOTION OF APPELLEE TO DISMISS

PAUL BARDACKE
Attorney General

EDDIE MICHAEL GALLEGOS
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TABLE OF AUTHORITIES

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Blatchford v. Gonzales, 22 N.M. St.Bar.Bull. 815, 816 (July 21, 1983) (Appendix A to Jurisdictional Statement)	2
Blatchford v. Gonzales, No. 82-36-CV, San Miguel Co., N.M. Dist. Ct.	2
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State v. Dana, 404 A.2d 551 (Me. 1979), cert. denied, 444 U.S. 1098 (1980)..... 6

Wendell v. Meirhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981)..... 6

Rules and Statutes Cited:

28 U.S.C. Section 1257(2)..... 4

28 U.S.C. Sections 2254, 2253, F.R.A.P. Rule 22b U.S. Sup. Ct. Rule 27,..... 5

18 U.S.C. Section 1151(b) 22 N.M. St.Bar.Bull. at 816..... 1,2,4

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Rule 57, New Mexico Rules of Criminal Procedure for District Courts NMSA 1978..... 1

MOTION TO DISMISS

Appellee *respectfully moves* the Court to dismiss this appeal on grounds that:

1. jurisdiction does not lie under 28 U.S.C. Section 1257(2);

2. the lower court's decision rests on independent and adequate state grounds;

3. the appellant has failed to exhaust his state and federal remedies; and

4. the question before this Court is not a substantial federal question.

QUESTION PRESENTED

Whether this Court should note probable jurisdiction to review that part of the state court decision which addressed the question whether Yah-ta-Hey, New Mexico, is a "dependent Indian community" under 18 U.S.C. Section 1151(b), when the state court's decision rested on state grounds requiring the appellant to exhaust his post-conviction remedies.

STATUTES INVOLVED

Appellant Blatchford's recitation of the constitutional and statutory provisions involved does not list Rule 57, New Mexico Rules of Criminal Procedure for District Courts NMSA 1978. Relevant text of Rule 57 appears as Appendix A to this motion. The critical portion for purposes of this case is Rule 57j: "A prisoner must exhaust his remedy under this rule before applying for a writ of habeas corpus".

STATEMENT OF THE CASE

In 1978 appellant Herbert Charles Blatchford, Jr., a member

of the Navajo Tribe, was convicted of being an accessory to the kidnapping and rape of a Navajo child in Yah-ta-Hey, New Mexico, two miles outside the boundary of the Navajo reservation. State v. Blatchford, Crim. No. CR-78-4, McKinley Co., N.M. Dist. Ct. The New Mexico Supreme Court affirmed the conviction. State v. Blatchford, No. 12,187 (March 1, 1979). Blatchford was confined to a state mental hospital.

In 1982, Blatchford filed a petition for a writ of habeas corpus in state district court. Blatchford v. Gonzales, No. 82-36-CV, San Miguel Co., N.M. Dist. Ct. The State of New Mexico moved to dismiss the petition because Blatchford did not file a Rule 57 motion in the sentencing court, as required by the New Mexico Rules of Criminal Procedure for the District Court, NMSA 1978, before applying for the writ in another state district court. The district court denied the motion, held evidentiary hearings, and decided that the State lacked jurisdiction over Blatchford because Yah-ta-Hey was Indian country.

The New Mexico Supreme Court reversed the lower state court's decision. It held the lower state court was without jurisdiction to grant the writ of habeas corpus because Blatchford failed to exhaust his post-conviction remedies under Rule 57(j). Blatchford v. Gonzales, 22 N.M. St.Bar.Bull. 815, 816 (July 21, 1983) (Appendix A to Jurisdictional Statement). In addition, "to afford guidance in further consideration of this matter should Blatchford pursue other remedies," the New Mexico Supreme Court decided Yah-ta-Hey was not Indian country within exclusive federal jurisdiction because it was not a dependent Indian community under 18 U.S.C. Section 1151 (b). 22 N.M. St.Bar.Bull. at 816.

Blatchford appeals to this Court from the New Mexico Supreme Court decision.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE DECISION OF THE NEW MEXICO SUPREME COURT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has consistently refused to review state court judgments based on independent and adequate state grounds. Michigan v. Long, __ U.S. ___ (No. 82-256, decided July 6, 1983); Fox Film Corporation v. Muller, 296 U.S. 207 (1935). The state court judgment here was based on independent and adequate state grounds. The New Mexico State Supreme Court held that Blatchford had failed to exhaust his post-conviction remedies under Rule 57 of the New Mexico Rules of Criminal Procedure for the District Courts; therefore the state district court lacked jurisdiction to entertain the writ of habeas corpus. 22 N.M.St.Bar.Bull. 815, 816. The New Mexico Supreme Court's decision, based on Blatchford's failure to follow appropriate state procedure, concerned only state law and was dispositive of the case.

The purpose of Rule 57 is to provide a uniform procedure for determining if a prisoner is entitled to relief. Committee Commentary R. 57 NMR. Crim. P. Rule 57(j) requires a prisoner to "exhaust his remedy under this rule before applying for a writ of habeas corpus." It provides a procedure to vacate, set aside or correct a sentence in the trial or sentencing court. It allows that court to have the first opportunity to correct any mistakes it may have made. It also prevents a second district court from initially guessing the trial court's intent because a prisoner may happen to file a habeas corpus petition in the county in which he is incarcerated rather than the county where the trial court is located. See Section 44-1-3, NMSA 1978.

Rather than making habeas corpus relief difficult, Rule 57 provides an extra opportunity to be heard.

Blatchford, however, argues that appeal properly lies from the New Mexico Supreme Court's second holding: that Ya-ta-Hey is not a "dependent Indian community" under 18 U.S.C. Section 1151(b). That second decision stands independent of the Rule 57 decision and was reached only "to afford guidance in further considerations of this matter should Blatchford pursue other remedies." 22 N.M.St.Bar.Bull. 815, 816. Even if this Court were to hear appeal on the federal issue and reach a differing interpretation, the judgment in state court would be the same: Blatchford would be made to observe the state procedural requirements under Rule 57. Therefore, the lower court decision rests on independent and adequate state grounds and this Court should refuse to entertain the appeal.

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THE JURISDICTION OF THE COURT UNDER 28 U.S.C. Section 1257(2)

Blatchford seeks to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(2). That jurisdiction is not properly invoked because he did not challenge below the constitutionality of any state statutes and the state courts did not rule on the issue. Jurisdictional Statement, Appendices A, B. His concern below, and his concern as well in the Jurisdictional Statement, was not with the constitutionality of state criminal laws but instead with whether Yah-ta-Hey, the location of the crime, is within Indian country. Appeal jurisdiction under 28 U.S.C. Sections 1257(2) does not lie from that question.